No. 13,156

IN THE

United States Court of Appeals

For the Ninth Circuit

STERLING CARR, Trustee of the Estate of Nippon Yusen Kaisya, a corporation, bankrupt, *Appellant*,

vs.

THE YOKOHAMA SPECIE BANK, LTD., OF SAN FRANCISCO, a foreign corporation, and MAURICE C. SPARLING, as Superintendent of Banks of the State of California and Liquidator of the Yokohama Specie Bank, Ltd., San Francisco Office, *Appellees*.

J. HOWARD McGRATH, Attorney General of the United States, as successor to James E. Markham, former Alien Property Custodian, *Appellee*,

vs.

STERLING CARR, Trustee of the Estate of Nippon Yusen Kaisya, a corporation, bankrupt, *Appellant*.

(CONSOLIDA

STERLING CARR, Trustee of the Estate of Nippon Yusen Kaisya, a corporation, bankrupt, *Appellant*,

vs.

J. HOWARD McGRATH, Attorney General of the United States, as successor to James E. Markham, former Alien Property Custodian, *Appellee*.

Appeal from the Judgment of the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES.

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J. HOWARD McGRATH, Attorney General of the United States, as successor to James E. Markham, former Alien Property Custodian, *Appellee*.

Appeal from the Judgment of the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES.

JURISDICTION.

This is an appeal by Sterling Carr, Trustee in Bankruptcy, from final judgment of the United States

District Court for the Northern District of California, Southern Division, entered August 20, 1951, ordering, adjudging and decreeing that plaintiff take nothing by reason of his complaint or cross-complaint, that defendant Maurice C. Sparling, Superintendent of Banks of the State of California and Liquidator of The Yokohama Specie Bank, Ltd., San Francisco Office, have judgment against plaintiff for his costs of suit, and that plaintiff in intervention J. Howard McGrath, Attorney General of the United States, have judgment against plaintiff for his costs of suit.

The jurisdiction of the United States District Court was invoked by appellant under the Bankruptcy Act of July 1, 1898, c. 541, §23, 30 Stat. 552; the Act of February 5, 1903, c. 487, §8, 32 Stat. 798; the Act of June 25, 1910, c. 412, §7, 36 Stat. 840; the Act of May 27, 1926, c. 406, §8, 44 Stat. 644; and the Act of June 22, 1938, c. 575, §1, 52 Stat. 854; U.S. Code, Title 11, section 46(b).

The jurisdiction of the United States District Court was invoked by appellee J. Howard McGrath, Attorney General of the United States under the Act of March 3, 1911, 36 Stat. 1091, U.S. Code, Title 28, section 41(1) and under the Act of October 6, 1917, 40 Stat. 425, U.S. Code, Title 50, Appendix, section 17.

Notice of appeal was filed on September 11, 1951 (U.S. Code, Title 28, section 2107, Rule 73, F.R.C.P.).

The jurisdiction of this Court is invoked under U.S. Code, Title 28, section 1291.

The Memorandum Opinion of the District Court is reported in 99 F. Supp. 4.

STATEMENT OF THE CASE.

This is an appeal from the final judgment entered by the District Court for the Northern District of California in a suit in equity, commenced by appellant, Sterling Carr (Trustee in Bankruptcy of the Estate of Nippon Yusen Kaisya, bankrupt) for a declaration that the balance of $66,884.15 in an account in the name of "Consul General—Yoshio Muto Special Account" is impressed with a trust in favor of the bankrupt (R. 3-11, 70-82). The account is in the Yokohama Specie Bank, Ltd., San Francisco Branch, which is now being liquidated by Maurice C. Sparling, Superintendent of Banks of the State of California, who resists the claim of appellant. The Attorney General of the United States,[1] this appellee, likewise contests the claim, since he has vested the account as the property of the Empire of Japan.[2]

Nippon Yusen Kaisya (NYK), a Japanese corporation, was engaged in ship transportation prior to World War II, but after the freezing orders (Execu-

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[1]By Executive Order No. 9788 (October 15, 1946, 11 F.R. 11981) the Attorney General succeeded to the powers and duties of the then Alien Property Custodian. In this brief, the term "Custodian" will be used to refer either to the Alien Property Custodian or to the Attorney General as his successor, as the context may require.

[2]While the account stands in the name of Yoshio Muto, the Consul General, it is not disputed that the account is that of the Japanese Government and not the personal account of Muto.

tive Order No. 8389) promulgated by the United States, it no longer sent ships into American ports (R. 197-198). In order to repatriate Japanese nationals from the United States, the Government of Japan requisitioned the NYK ship *Tatuta Maru,* among others (R. 203-204) and gave to NYK a power of attorney to operate that vessel as agent of the government (R. 313). The *Tatuta Maru* came to San Francisco under that requisition. All documents pertaining to this voyage designate the vessel as "Japanese Government Requisitioned Ship" (e.g., R. 96, 97, 105, 107, etc.).

The funds in controversy are the balance remaining in the account standing in the name of the Consul General of Japan. They derive from two sources: (1) $39,000.00 was deposited in the account from Japan by telegraphic transfer, pursuant to license granted to the Consulate General of Japan (R. 320-322). These funds were to be used to pay the port expenses of the *Tatuta Maru* (R. 321). (2) Subsequent to this initial deposit, sums totaling $66,811.42 were deposited, representing fares paid by persons sailing on the return trip of the *Tatuta Maru* (R. 102-106, 108-109, 332-336). Withdrawals for payment of the vessel's port expenses were made from this account, leaving the balance involved in this suit. Included in those withdrawals was the payment of an agency fee to NYK for its services in handling the ship in port (R. 343-344).

Inasmuch as this appeal involves questions of fact, the facts will be analyzed further in the argument of this brief.

QUESTIONS PRESENTED.

1. Whether the conclusion of the District Court that the evidence failed to establish the existence of a resulting trust in favor of Nippon Yusen Kaisya is clearly erroneous.

2. Whether, assuming *arguendo* that the evidence did establish the existence of a resulting trust in favor of Nippon Yusen Kaisya, the District Court committed error in holding that it could give no judicial recognition to that beneficial interest.

SUMMARY OF ARGUMENT.

The evidence before the District Court on the question of the existence of a resulting trust was conflicting. Therefore, that court properly held that appellant failed to prove the existence of such a trust by clear and convincing evidence. The weight of the evidence supports the District Court's conclusion that no resulting trust was created. Under these circumstances that court's conclusion that no such trust existed is clearly not erroneous.

Moreover, if it be assumed that the deposits of the funds in the Special Account were made for the benefit of NYK, such deposits were transactions in viola-

tion of federal freezing regulations, because they were not licensed by the Secretary of the Treasury. The District Court therefore properly held that under the principles of law established in *Propper v. Clark,* 337 U.S. 472, it could not give judicial recognition to NYK's claim to a beneficial interest. Appellant's contention that the *Propper* case and the case of *Lyon v. Singer,* 339 U.S. 841, support his view that the District Court should have rendered judgment declaring NYK's beneficial interest, is without merit.

The judgment of the District Court was clearly correct and should be affirmed.

ARGUMENT.

I.

THE DISTRICT COURT'S CONCLUSION THAT NO RESULTING TRUST EXISTED IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE AND IS CLEARLY NOT ERRONEOUS.

Appellant's case rests on the theory that there existed a resulting trust in favor of NYK with respect to the account in dispute. It is settled that "clear and convincing evidence" is required to establish a resulting trust. *Allen v. Withrow,* 110 U.S. 119-120 (1863); *Johnson v. Umsted,* 64 F. 2d 316, 318 (C.A. 8, 1933); *Hubbard Investment Co. v. Brast,* 59 F. 2d 709, 710 (C.A. 4, 1932); *Bowmaster v. Carol,* 23 F. 2d 825, 828 (C.A. 8, 1928); *Higginbotham v. Boggs,* 234 Fed. 253, 257 (C.A. 4, 1916); *Gomez v. Cecena,* 15 Cal. 2d 363, 366-367, 101 P. 2d 477 (1940); *Helm v. Zaches,* 94 C.A. 2d 625, 628, 211 P. 2d 329 (1949).

The trial court found as a fact that the account was not intended to be held for the benefit of NYK, that the Japanese Government was at all material times the sole legal and beneficial owner of the account, and that NYK never had any beneficial interest in the account (R. 55-56). We believe that finding is supported by the weight of the evidence. Be that as it may, it is not enough that this Court might have reached a contrary result if it had heard the case in the first instance; this Court will not reverse on the facts unless it determines that the findings are clearly erroneous. The Supreme Court has said that a finding is "clearly erroneous" when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395.

The issue on appeal therefore turns on whether on the entire evidence this court is "left with a definite and firm conviction that a mistake has been committed" by the trial court in finding that appellant has failed to show by clear and convincing evidence that the account was to be held for the benefit of NYK.

We think that, taking the evidence as a whole and viewing it in the light most favorable to appellant, the strongest statement that can be made is that its effect is equivocal, and that it is as consistent with an inference that the account belonged to the Japanese Government as it is with an inference that it belonged to NYK. That being so, the party who had

the burden of proof, the appellant, must lose. *Penna. R. Co. v. Chamberlain,* 288 U.S. 333, 339-340.

For example, appellant's chief argument is that the Japanese Government went through the form of requisitioning the *Tatuta Maru* in 1941 because otherwise the American creditors of NYK might have attached her and thus prevented the use of the ship to repatriate Japanese nationals (Appellant's Opening Brief, pp. 14-22). From this start, appellant jumps to the conclusion that the requisitioning was a sham, and that in fact the ship continued to be operated by NYK for its own account and that the bank account set up for purposes of the operation of the ship was the property of NYK. But the purpose of the Japanese Government, the assurance of a method of repatriation, would have been even better served by a genuine requisitioning than by a sham one, and the mere fact that that Government, which had a perfectly legitimate and governmental function to fulfill, chose a method that would be proof against the attacks of creditors is in itself no evidence of fraud; on the facts stated legitimacy is as likely as sham, and there is no presumption of fraud.

There is substantial evidence both among the documents introduced by defendant and among the plaintiff's documents that the Japanese Government is the sole owner of the account.

1. Appellant relies heavily (Appellant's Opening Brief, p. 18) on a lengthy, confidential report of the Bureau of Political Affairs, Ministry of Foreign Affairs, of the Japanese Government, dated December

1942 (Plaintiff's Exhibit 20-E, R. 203-209). The document purports to be no more than its title indicates, namely, an unsworn account made over a year after the events in issue and based on unsworn reports of Japanese Government officials. Quite apart from the competence of this document as evidence, it is equivocal. In point of fact, it shows that at least the Japanese embassy in the United States regarded the funds in the account as government property.

The document states:

> It [the embassy] pointed out that there was no alternative but to receive the passage fare in cash or check, if not prepayable in Japan, and deposit the same in the special Consular accounts, and, *later appropriate it to the official Consular expenses* on basis of the agreement between the Governments of Japan and America for the special mutual disposition of Government office expenses and living expenses of members thereof (R. 205-6). (emphasis supplied)

And later in the same document:

> Furthermore, as to the balance of the passage money at various North American ports of call, negotiation was under way to have them released from the application of the Monetary Freezing Act in order to use them to defray expenses of offices of the Ministry there. Although the United States Government had an inclination to accept our proposal, before detailed arrangements were made, it became impossible, due to the commencement of the Greater East Asia War (R. 209).

Here, in short, in the words of a document introduced by the appellant is a clear demonstration that the beneficial ownership of the moneys was to be in the Japanese Government. The Japanese Government may have undertaken to compensate NYK for the requisitioning, such compensation to include NYK's actual loss (R. 197), but the existence of such obligation does not create a resulting trust. (Cf. *Restatement of Trusts,* Section 445 (1935)).

2. Plaintiff's Exhibit 20-E also sets forth the order by which the *Tatuta Maru* was requisitioned (R. 203). The propriety of the Japanese Government's decision to take over the ship for a public purpose (the repatriation of Japanese nationals in the United States) is, of course, a diplomatic, rather than a judicial, matter. *The Maipo,* 259 Fed. 367, 368 (S.D.N.Y., 1919). But in any case, the requisitioning was a genuine official act of the Japanese Government as the court below found (R. 56). Appellant, while expressly disavowing in the trial court (R. 158, 159) the conspiracy he alleges in his complaint (R. 6-7), here argues that the entire plan of requisitioning and of opening of the consular account was a sham, that it was not bona fide (Appellant's Opening Brief, pp. 12, 14-22) and that the Secretary of State of the United States was a party to the agreement "to have it appear that the NYK vessels had been requisitioned" (Appellant's Opening Brief, p. 12). As to the United States appellant's intimation of its connivance in an alleged plan to defraud American creditors has no foundation whatsoever. The suggestion seems to be

derived from the following statement in Plaintiff's Exhibit 20-E (R. 199-202):

> However in case the Japanese Government informs this [the United States] Government by formal statement that the three vessels concerned are requisitioned vessels of the said Government, this Government is ready to call the attention of the judicial authorities concerned with reference to the statement of the Japanese Embassy to this department, certifying the requisition of the said vessels, with the object of removing difficulties that may arise by suits against these vessels if suits are filed against the above vessels by civilians (R. 200).

The statement shows simply that the United States, as a matter of international courtesy, was willing to invite the court's attention to the requisitioning should Japan formally advise that such action had taken place. With respect to the act of requisitioning itself, every normal circumstance attendant upon a genuine transaction was present: a formal requisition order was issued and directed to NYK (R. 203-4); representatives of the Japanese Government were placed aboard the vessel to supervise its operations (R. 202); its financial affairs in an American port were placed under the supervision of the government's representative, its Consul; and official notice of the requisitioning was given to the American Government (R. 202).

As reflecting on the genuineness of the requisition, appellant relies strongly (Brief, p. 19) on a report dated August 30, 1948 from Chief Accountant Bureau of Foreign Affairs Ministry to Chief of General Af-

fairs Bureau, Ministry of Foreign Affairs, Japanese Government (R. 212-213). But even assuming the competence as evidence of this hearsay report, seven years after the event, it does not support appellant's position, for the report begins:

> As documents relating to the said requisition order are untraceable, it is impossible to draw a clear conclusion as to the nature of this requisition (R. 213).

Appellant further claims, as an "admission" by Japan of the beneficial interest of NYK in the fund (Appellant's Brief 8), certain statements contained in the report of August 30, 1948 and a letter of September 6, 1948 from the Japanese Government to NYK. Apparently NYK by letters of May 13, 1947 and August 12, 1948 (not in evidence but referred to in Exhibit F) had petitioned for reimbursement under the "Japanese War Indemnity Special Measures Law" of sums paid to the Japanese Finance Ministry. The report of August 30, 1948 shows that the balance in the special account involved in this action was included in the amount claimed by NYK, and recommends that the claim be disallowed on the ground that the funds in the Special Account belonged to NYK. The letter of September 6, 1948 notifies NYK of this conclusion and rejects its claim, on the ground that the funds in the consular account (or Special Account) belonged to NYK and that company should have recourse only against that fund.

As an "admission" these documents are of questionable admissibility. Vested property becomes the

property of the United States (*Cummings v. Deutsche Bank,* 300 U.S. 115), and the Japanese Government as a former holder of title had no power to bind the United States. Also, apart from any question as to the competence of these documents as evidence, it is quite apparent that they are entitled to little weight, if any. They reflect merely opinions not reduced to writing until long after the transaction took place, after the outbreak of the war, and at a time when self-interest would dictate the view which the parties would take of the effect of the payment. Thus, as late as 1947 and 1948, when it was apparent to both NYK and the Japanese Government that the loss of the fund would fall on the one which was its owner, we find NYK claiming it belonged to the Japanese Government and the latter that it belonged to NYK. Appellant now in effect asks this Court to reverse the trial judge because he chose to form his own conclusions rather than accept speculative and self-serving opinions formed some seven years after the transaction by agents of the Japanese Government.

The circumstances surrounding the requisitioning were that the Government of Japan urgently needed to repatriate its nationals (R. 194-195), but the NYK would not bring its vessels into American ports because of freezing restrictions (R. 197-198). The *Tatuta Maru* was formally requisitioned (R. 203), and NYK was directed to operate the ship on behalf of the Government (R. 203, 308-9, 313). It is significant, indeed, that NYK was paid an agent's commission as compensation for its services in handling the ship on

behalf of the Japanese Government (R. 332-336, 343-344). Appellant would have us believe that this payment was in furtherance of a scheme to protect the ship from seizure by American creditors (App. Br. p. 21). He overlooks the fact that the ship had long since departed from the American port (R. 74) before the license for this payment was sought (R. 332-336). This agency accounts for all of the circumstances recited in Appellant's Opening Brief, pp. 19-20, showing continued participation by NYK in the operations of the vessel. We can find no basis for appellant's statement, Brief, p. 20) that "NYK sold passage tickets and collected passage moneys for said voyage as principal and did not represent to the public that said passage tickets were sold and passage moneys collected by NYK as the agent of the Japanese Government . . ." The references cited by the appellant all demonstrate that each document pertaining to the voyage in question was stamped "Japanese Government Requisitioned Ship" (e.g., R. 96, 97, 105, 107, etc.).

3. Finally, to be contrasted with the questionable evidence based on opinions formed from one to seven years after the event on which the appellant relies, is the contemporary evidence, most of it in the nature of statements made under oath.

Plaintiffs' Exhibit 22 (R. 258, 315) is an application, No. SF 11630, made to the Secretary of the Treasury for a license to receive a remittance of $39,000.00 from the Japanese Government for deposit

to the account of Consul General Muto in Yokohama Specie Bank, San Francisco, to be used for the port expenses of the *Tatuta Maru,* described as a Japanese Government requisitioned ship (R. 316). This application represents and warrants that no one other than the applicant (i.e., the Japanese consulate) has any interest, direct or indirect, in the transaction (R. 316). NYK is not mentioned as a party or as having any interest in the fund. This application was granted by License No. SF 11630, October 29, 1941 (Plaintiff's Ex. 23, R. 259, 330).

Plaintiff's Exhibit 29 (R. 317-320) is an application, No. 11631, made October 22, 1941, to the Secretary of the Treasury by Yokohama Specie Bank, San Francisco. It stated that Yokohama Specie Bank, San Francisco had received telegraphic instructions from the bank's Tokyo office, by order of the Japanese Government, to pay the sum of $39,000 to Consul General Muto in San Francisco, and requested a license to charge Yokohama Specie Bank Japan's account with this amount and credit it to Muto's account. It represented and warranted that no one other than the parties mentioned in the application had any interest, direct or indirect, in the transaction (R. 319). NYK is not mentioned as a party. This application was granted by License No. SF 11631, October 29, 1941 (R. 362-364, 324-325, Plaintiff's Exhibit 27, R. 264).

Defendant's Exhibit D (R. 307-314) is an application, No. SF 11535, made by NYK to the Secretary

of the Treasury on October 22, 1941. It stated that NYK desired a license in order

> To handle the Japanese Government requisitioned ship *Tatuta Maru* in the port of San Francisco, due on or about October 30, 1941, as authorized by the power of attorney executed by Yoshio Muto, Consul General of Japan at San Francisco, a notarized true copy of the original thereof is herewith attached.
>
> Such acting will involve assisting in issuing of tickets for passage fares at the San Francisco office and the sub-branch at Los Angeles, and other affairs in connection with the ship's operation.
>
> All receipts and all disbursements incident to this operation are independent and bear no connection with the Nippon Yusen Kaisya funds.

To this application was attached a power of attorney from Muto to NYK reading in part:

> Yoshio Muto, Consul General of Japan, San Francisco, California, U.S.A., as official representative of the Imperial Government of Japan, which Government has requisitioned the M.S. Tatuta Maru, for its needs and purposes, herewith authorizes Nippon Yusen Kaisya (NYK Line), 500 California Street, San Francisco, a corporation organized and existing under the laws of the Empire of Japan, to act as its attorney in fact in all matters, business, operations, and affairs, arising in connection with the call of the said M.S. Tatuta Maru at the Port of San Francisco, October 30, 1941, to November 21, 1941 (R. 313).

The response to this application was a letter dated October 29, 1941, from the Federal Reserve Bank of San Francisco, advising NYK that no action was being taken thereon because the *Tatuta Maru* was to be operated by the Consul General, who had filed an application for a license covering the ship's operations (R. 308-309).

Defendant's Exhibit E (R. 325-327) is an application, No. SF 11537, made October 21, 1941, to the Secretary of the Treasury by the Consulate General of Japan at San Francisco:

> to operate the Japanese Government requisitioned ship *Tatuta Maru,* in the port of San Francisco, due on or about October 30, 1941.

It contained the usual representations and warranties as to the parties in interest, and did not name NYK as such a party. It was granted by License No. SF 11537, dated October 29, 1941 (R. 327-328).

Defendant's Exhibits F, G, H and I (R. 328-330) consist of four applications for licenses and the licenses granted in response thereto, bearing Nos. SF 11538, SF 11539, SF 11541, and SF 11540. These applications were made by the Consulate General of Japan at San Francisco to make disbursements from the Special Account for port expenses for the Tatuta Maru.

Defendant's Exhibit J (R. 332-334) the application for a license to pay NYK a handling commission and agency fee has already been referred to (*supra,* p. 14). This application was granted by License

No. SF 12971, dated November 19, 1941 (Defendant's Ex. K, R. 334-336).

These documents were evidence, in the form of declarations made under oath by the Japanese Government and NYK, that the following facts were true: first, that the requisitioning by the Japanese Government of the *Tatuta Maru* was a genuine governmental action; second, that no one except the Japanese Government had any interest in the funds deposited in the Special Account; and third, that NYK's position with respect to the operation of the vessel was that of agent for the Japanese Government.

The District Court concluded that on all the evidence before it, a resulting trust was not established. It said (R. 46-47):

> . . . it is axiomatic that to establish a resulting trust the evidence must be clear and convincing. In this case, while there is evidence of questionable competence that indicates that NYK furnished the money with which the Special Account was opened, it does not follow that a trust relationship was thereby created. To find such a trust relationship the Court would have to rely on opinions and conclusions of the witness (Hiroyoshi) and on certain correspondence had between NYK Tokyo and Japanese Government officials, months and even years after the events herein and after the interests of the United States had intervened. When this evidence is weighed against the undisputed evidence that the Tatuta Maru was operated as a Japanese Government requisitioned vessel, that NYK and the Government of Japan stated under oath that no

one other than the Government of Japan had any interest in the bank account involved, and that NYK applied for and received permission from the Treasury Department to be paid an agency fee for its handling of the ship, it falls short of meeting the "clear and convincing" test necessary to establish a resulting trust.

The appellant alleges error in the District Court's "failing to make a finding on the issue: 'Did NYK furnish or provide the consideration out of which the bank account involved arose?' " The quotation from the court's opinion just given contains the answer. It declares that ". . . while there is evidence of questionable competence that indicates that NYK furnished the money with which the Special Account was opened, it does not follow that a trust relationship was created." In other words, the evidence as a whole rebuts any presumption that NYK was to retain the beneficial interest in the money, even if it be assumed that the money originally came from that company. Such a presumption is, of course, rebuttable. *Tryon v. Huntoon,* 67 Cal. 325, 7 Pac. 741 (1885); *Gammill v. Nunes,* 104 Ad. Cal. App. 224, 231 P. 2d 86, 87 (1951); *Owings v. Langharn,* 53 Cal. App. 2d 789, 128 P. 2d 114 (1942); *Knouse v. Shubert,* 48 Cal. App. 2d 685, 121 P. 2d 74 (1941); *Elms v. Elms,* 24 Cal. App. 2d 696, 76 P. 2d 126 (1938).

The record abundantly demonstrates the liberality of the trial judge in admitting appellant's evidence and in providing appellant with every opportunity to prove his case. Nevertheless, apart from any ques-

tion as to the admissibility, appellant's evidence has slight probative force. As we have shown, that evidence was at best equivocal. Accordingly, the trial judge was amply justified in finding that appellant did not prove a resulting trust by clear and convincing evidence. What the District Court had before it were the declarations made by the Japanese Government and NYK in 1941, prior to the outbreak of war, and the declarations made by them in 1942 and 1948, after the outbreak of war and the interests of the United States had intervened. It properly held that the earlier declarations made at the time of the events in issue constituted weightier and more reliable testimoney. This is, therefore, not a case which on the entire evidence leaves room for a "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co., supra.* And see *Grace Bros. v. Commissioner of Internal Revenue,* 173 F. 2d 170, 173-174 (C.A. 9, 1949). The District Court's conclusions in the present case were not only not clearly erroneous, but were fully supported by the weight of the more credible evidence.

II.

THE DISTRICT COURT PROPERLY HELD THAT AS A MATTER OF LAW IT COULD NOT GIVE JUDICIAL RECOGNITION TO APPELLANT'S CLAIM THAT NYK HAD A BENEFICIAL INTEREST IN THE SPECIAL ACCOUNT.

A. The deposit in the Special Account, if made for the benefit of NYK, was a transaction prohibited by the freezing regulations.

The funds deposited in the Special Account had their sources in two different kinds of financial transactions. The initial deposit of $39,000.00 had its origin in funds brought into the United States from Japan by means of a telegraphic transfer of a bank credit from YSB Japan to YSB San Francisco. The subsequent deposits, aggregating in excess of $68,000.00, had their origin in moneys paid by Japanese nationals in the United States as fares for passage on the home voyage of the *Tatuta Maru*. The initial deposit was of money arising out of a transfer of bank credit by YSB Japan, a banking institution outside the United States, to YSB San Francisco, a banking institution within the United States. The subsequent deposits were of moneys already within the United States but paid into the blocked Special Account maintained in YSB San Francisco.

At the time these transactions took place Executive Order No. 8389, as amended July 26, 1941, 6 F.R. 3715, 12 U.S.C.A. §95a note (the pertinent portions of which are set forth in the Appendix, pp. ii-iv), issued by the President, and General License No. 1 as amended June 14, 1941, 6 CFR 2907, Title 31 CFR 1941 Supp. 2682 (the pertinent portions of which are

set forth in the Appendix, pp. iv-v), issued by the Secretary of the Treasury pursuant to powers conferred on him by the President, were in effect. Except as licensed transfers of bank credit between foreign and domestic banks for the benefit of a Japanese national were prohibited by Sec. 1, subparagraph A of the Order, and payments to any domestic bank were prohibited by subparagraph B thereof. In addition, paragraph (ii) (A) of General License No. 1 expressly declared that the general license which it granted authorizing payments into any blocked account in a domestic bank maintained in the name of any blocked national, was not to be construed to authorize payments into such an account if such account was maintained in the name of any one other than the ultimate beneficiary thereof. These provisions prohibited the transfer of credit and all payments into the Special Account unless they were licensed by the Secretary of the Treasury.

As we have already shown, licenses were granted to the Japanese Government, YSB Japan, YSB San Francisco, and the Consul General, acting for the Japanese Government, to effect these transactions. License No. SF 11630 (P's Ex. 23, R. 259, 320), issued to the Consul General, authorized him to receive the $39,000.00 from the Japanese Government and deposit it in a blocked account in his name in YSB San Francisco. License No. SF 11774 (P's Ex. 28, R. 266, 323), issued to the Consul General, authorized him to receive the $68,000.00 estimated to result from the operation of the *Tatuta Maru* and to deposit

such income in the same account. There is no question, therefore, that if the only blocked national having an interest in the funds deposited in the Special Account was the Japanese Government, these transactions were duly authorized by these licenses. It is equally clear that if NYK was the beneficial owner of these funds, as appellant contends, these transactions were effected for the benefit of NYK, and in such case NYK would have an indirect interest in the funds, not disclosed to the Secretary of the Treasury at the time the licenses were applied for and issued, and the transactions would be unlicensed and hence prohibited.

There is no doubt, therefore, that if the transactions were effected for the benefit of NYK, they violated the freezing regulations.

B. Propper v. Clark precludes the acquisition of an interest based on a prohibited transaction unless licensed by the federal government.

Of course, if appellant failed to prove that the transactions in question were effected by the Japanese Government for the benefit of NYK and not for its own account, there is no occasion to reach the question whether the acquisition of an interest by NYK in the Special Account was prohibited by Executive Order No. 8389. On appellant's argument, however, at the time that the first deposit was made by the Consul General in the Special Account, a trust in that account resulted then and there in favor of NYK. Consul General Muto received the money as the property of his Government and deposited it as such, so the

acquisition of any interest by NYK must have been the result of a transfer. The District Court held that, under *Propper v. Clark, supra,* it could not recognize any claim of NYK to an interest so acquired.

Appellant argues that in this action he seeks merely a declaration that NYK had the beneficial interest and that he does not seek here payment of the funds on deposit in the Special Account. He seeks to support this argument by citations of the *Propper* case and of *Lyon v. Singer, supra,* as well as by reference to Treasury General Ruling No. 12 (April 21, 1942, 7 F.R. 2991). He contends that under those decisions and the General Ruling he is entitled to litigate the question of the beneficial ownership of the account.

The question here, however, is not the right of appellant to litigate but the effect of the transactions in 1941 and whether by those transactions NYK acquired any interest which our courts will recognize. As we have shown, *supra,* pp. 22-23, no acquisition of any interest by NYK was licensed by the Treasury Department.

The Supreme Court, in *Propper v. Clark, supra,* appears to have settled the law to the effect that:

> The language of the order prohibits more than payment. It prohibits transfers of credit. (337 U.S. at 486.)

The effect of the decision in *Lyon v. Singer, supra,* seems to be only that a state court may adjudicate a claim to priority under a state banking law, as long as no transfer of title is involved, for the Court ex-

pressly said that the *Propper* case, in which it held that the Order prevented unlicensed transfers, was not to the contrary. 339 U.S. at 842-843.

The property in question was a debt owed by YSB San Francisco to the Consul General. It was clearly property within the United States and a transfer of any interest therein was within the prohibitions of the Executive Order. It came into existence as the result of deposits made in the Special Account, beginning with the initial deposit of $39,000 on October 29, 1941, and was maintained thereafter as moneys collected for passage fares on the *Tatuta Maru* were deposited. The resulting trust which appellant claims existed could not have arisen, at the earliest, before October 29, 1941, the date of the initial deposit. On that date, the Executive Order was already in effect. By a formal assignment of its interest, unlicensed, the Japanese Government could not have transferred ownership of the account to NYK. To reach a contrary result in the absence of a transfer would be paradoxical, and would be just as contrary to the purpose of the Executive Order as would recognition of a voluntary and unlicensed transfer.

CONCLUSION.

The judgment of the District Court was correct and should be affirmed.

Dated, May 15, 1952.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

1. Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U.S.C. 1 et seq.:

Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U.S.C. App. 5:

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign coun-

try or national thereof shall vest, when, as and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; . . .

2. Executive Order No. 8389, April 10, 1940, 5 F.R. 1400, as amended by Executive Order 8832, July 26, 1941, 6 F.R. 3715:

By virtue of and pursuant to the authority vested in me by section 5(b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, Franklin D. Roosevelt, President of the United States of America, do prescribe the following:

Executive Order No. 8389 of April 10, 1940, as amended, is amended to read as follows:

Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any na-

tional thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions. . . .

Sec. 3. The term "foreign country designated in this Order" means a foreign country included

try or national thereof shall vest, when, as and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; . . .

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A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions. . . .

Sec. 3. The term "foreign country designated in this Order" means a foreign country included

in the following schedule, and the term "effective date of this Order" means with respect to any such foreign country, or any national thereof the date specified in the following schedule: . . .

(k) June 14, 1941—
China, and Japan; . . .

3. General License No. 1, as amended, June 14, 1941, 5 F.R. 1616, 1695, 2284, 2309, 2593, 6 F.R. 2907:

A general license is hereby granted authorizing any payment or transfer of credit to a blocked account in a domestic bank in the name of any blocked country or national thereof providing the following terms and conditions are complied with:

(1) Such payment or transfer shall not be made:

(a) From any blocked account in a domestic bank; or

(b) From any other blocked account if such payment or transfer represents, directly or indirectly, a transfer of the interest of a blocked country or national thereof to any other country or person.

(2) This general license shall not be deemed to authorize:

(a) Any payment or transfer to any blocked account held in a name other than that of the blocked country or national thereof who is the ultimate beneficiary of such payment or transfer; or

(b) Any foreign exchange transaction including, but not by way of limitation, any trans-

fer of credit, or payment of an obligation, expressed in terms of the currency of any foreign country.

This general license should not be employed to make any payment or transfer of credit comprising an integral part of a transaction which cannot be effected without the subsequent issuance of a further license.